Supreme Court, U.S.
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No. 98-1064 (3)

In The

Supreme Court of the United States

October Term, 1998

American Academy of Pain Management,
a California Non-Profit Corporation, Arnold Fox, M.D.,
an individual, and B. Eliot Cole, M.D., an individual,

Petitioners,

v.

Ronald Joseph in his official capacity as the
Executive Director of the Medical Board
of California and not personally.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF

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TABLE OF AUTHORITIES

Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed2d 341 (1980).	3
Ibanez v. Florida, (1994) 512 U.S. 136, 146, 114 S.Ct. 2084, 2090, 129 L.Ed.2d 118.	3
Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990).	3

REPLY
TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

American Academy of Pain Management replies because the Opposition introduced a new argument. The Opposition rephrased the questions on appeal and by doing so introduced a new argument not directly raised by the Opinion of the Ninth Circuit Court of Appeals and not presented by the Petitioner. When the new argument is introduced, it makes the new questions presented similar to "when did you stop beating your wife" type of questions. These new types of questions assume that the Petitioner does not have objective and consistently applied standards. This assumption is made without a trial. This assumption presumes the regulatory defined standards are the only possible standards. This assumption assumes without trial that the Petitioner cannot prove equivalence with the regulatory standard.

In rephrasing the "Question Presented" the Opposition not only changes the question but presents a new compound question with two parts.

One of the questions raised by the Opposition is the following: Is the use of the term "Board Certified" or "Board Certification," in advertising, by a physician member of a certification board, "inherently misleading" [merely] because the advertising of "Board Certification" does not meet state standards?

The second question raised by the Opposition is the factual-legal question: Does the Petitioner have

objective and consistently applied standards?

The Opposition states incorrectly that the Court of Appeals found the AAPM use of the term "board certification" inherently misleading. The Court of Appeals did not find "inherently misleading" the Petitioners' use of "Board Certified." The Opposition mistakenly asserts such was the case. The Opposition does so by citing page 3a and 4a of the Petition. Page 3a and 4a is the Opinion of the Ninth Circuit Court of Appeals which reference the Opinion of the District Court.

The District Court did not try this case. The District Court denied a motion for preliminary injunction. The District Court denied the motion with an Opinion which had effectively ended the Petitioners' case without trial. The District Court decided,

> "Once a state has set such standards, advertising certification from a board that does not meet such standards [those set by the state] is inherently misleading."
> page 23a, District Court Order dated May 23, 1997 denying a preliminary injunction.

Insofar as the words used by the Opposition suggest a finding that the AAPM use of the term "Board Certified" is factually misleading, this introduces a factual-legal question which is not present in the record, and on which there has been no trial. The finding of "inherently misleading" is a finding of the District Court and not of the Ninth Circuit Court of Appeals. The District Court rifled its ruling, in its final analysis, and based its ruling on the requirements of Statute and the Regulation. See Petition, page 23a, lines 6-14.

What the Opposition proposes is that the state may define the words "Board Certified" by defining standards which exhaustively set standards for the use of the words "Board Certified." Once the standards are defined, any other use is conclusively presumed to be "inherently misleading." This conclusive presumption removes the need for the tests of Central Hudson and Peel. The Peel Court found the words "board certified" were not "inherently misleading," were entitled to the scrutiny due commercial speech under the First Amendment, and not deserving of prohibition if more disclosure eliminates the possibility of confusion. The Opposition proposition impermissibly shifts the burden of proof to the speaker. This takes from the Courts and places in the hands of a Legislature and or an Administrative Agency the role of defining which speech is "inherently misleading." This proposition gives the state the power to prohibit and criminalize truthful speech by defining truthful speech as "inherently misleading" speech. This allows the regulator to enunciate the words "inherently misleading" and to prohibit speech at a pretrial proceeding. This violates the Supreme Court's ruling cautioning against hasty prohibitions of commercial speech.

> "...[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"
> Ibanez v. Florida (1994) 512 U.S. 136,146, 114 S.Ct. 2084, 2090, 129 L.Ed.2d 118.

The new questions raised by the Opposition more clearly focuses on the danger posed by the Ninth Circuit Court of Appeals decision which rewrites the rules protecting commercial speech.

Respectfully submitted,

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